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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,912

HELBROS WATCH COMPANY, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition to Review and Modify Order of the Federal Trade Commission

Decided November 29, 1962

Mr. B. Paul Noble for petitioners.

Mr. Charles C. Moore, Jr., Attorney, Federal Trade Commission, with whom *Messrs. James McI. Henderson*, General Counsel, and *Frederick H. Mayer*, Attorney, Federal Trade Commission, were on the brief, for respondent.

Before WILBUR K. MILLER, FAHY and WRIGHT, *Circuit Judges.*

WRIGHT, *Circuit Judge:* Petitioners seek review[1] of a final order of the Federal Trade Commission requiring them, inter alia,[2] to cease and desist from:

> "Representing directly or by implication:
>
> • • • • • • • • • •
>
> "(e) That certain amounts are the usual and regular retail prices of respondents' merchandise when such amounts are in excess of the prices at which such mer-

[1] 38 Stat. 719 as amended, 15 U.S.C. § 45(d)(e)(g).

[2] Petitioners were also ordered to desist from representing that their watches contained ruby jewels and were shockproof, water-resistant, and guaranteed for life. No appeal was taken from this portion of the order.

chandise is usually and regularly sold at retail, by the class of retailers selling such merchandise, in the trade area or areas where the representation is made."

Fictitious pricing in the form of false "pre-ticketing" is the now wide spread practice, particularly among, but by no means limited to, manufacturers, of representing, usually on the package or the article itself, a retail price substantially higher than the actual price to the consumer. Its vice is its deception and the understandable inability of the price-conscious consumer to control his urge to make a "good buy."[3]

Petitioners do not dispute that fictitious pricing is illegal.[4] The only issue is whether the finding of the Com-

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[3] See Murphy, *The Ethics of Retail Price Advertising*, 6 Antitrust Bulletin 419, 423 (1961); *Comment*, 39 Tex. L. Rev. 903, 906 (1961); Beer, Federal Trade Law and Practice, 387 (1942). The Commission has issued certain guidelines for determining whether advertised prices are fictitious. See 2 Trade Regulation Reporter ¶ 7897. Compare the Automobile Information Disclosure Act, 72 Stat. 325, 15 U.S.C. §§ 1231-1233.

[4] Fictitious prices are illegal even though it is obvious to the sophisticated that the price tag is only a come-on. "The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions." *Florence Mfg. Co.* v. *J. C. Dowd & Co.*, 2 Cir., 178 F. 73, 75 (1910). See *Trade Comm'n* v. *Education Society*, 302 U.S. 112 (1937); *Art National Manufacturers Distributing Co.* v. *F.T.C.*, 2 Cir., 298 F. 2d 476 (1962), cert. denied, 370 U.S. 939 (1962); *Bankers Securities Corporation* v. *F.T.C.*, 3 Cir., 297 F. 2d 403 (1961); *Baltimore Luggage Company* v. *F.T.C.*, 4 Cir., 296 F. 2d 608 (1961), cert. denied, 369 U.S. 860 (1962); *Clinton Watch Company* v. *F.T.C.*, 7 Cir., 291 F. 2d 838 (1961); *Niresk Industries, Inc.* v. *F.T.C.*, 7 Cir., 278 F. 2d 337 (1960), cert. denied, 364 U.S. 883 (1960); *Harsam Distributors, Inc.* v. *F.T.C.*, 2 Cir., 263 F. 2d 396 (1959); *Kalwajtys* v. *Federal Trade Commission*, 7 Cir., 237 F. 2d 654 (1956), cert. denied, 352 U.S. 1025 (1957); *Thomas* v. *Federal Trade Commission*, 10 Cir., 116 F. 2d 347 (1940).

mission, that the retail price tag placed on the watches is in excess of the usual and regular price at which the watches sell at retail, is supported by substantial evidence upon the record viewed as a whole.[5] We conclude that it is.

Helbros manufactures two distinct lines of watches which it sells to three classes of buyers. It places a price tag, clearly visible to the ultimate purchaser, on all the watches, and it is apparent that this price tag carries with it the implication that the amount listed thereon is the usual and regular price at which the watch sells at retail. One line of watches is sold exclusively to house-to-house canvassers and long-term credit jewlers. These watches are pre-ticketed at 400 to 500 per cent of cost. This market accounts for about 30 per cent of Helbros' business. Helbros sells an entirely different line, constituting the other 70 per cent of its business, to two different groups. One group, absorbing 40 per cent of Helbros' total sales, or 57.1 per cent of this particular line, is made up of discount stores and catalog houses. The balance of this line is sold to jobbers and ordinary retail jewlers. This second line is pre-ticketed for both groups at 250 per cent of cost.[6]

The evidence as to the price actually paid by the ultimate consumer shows that the line of watches sold to house-to-house canvassers and long-term credit jewlers usually sells at or near the pre-ticketed price. The watches which are sold to the discount stores and catalog houses, however, constituting 40 per cent of total sales, of 57.1 per cent of sales of that line, are regularly sold at about 50 per cent

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[5] 5 U.S.C. § 1009(e); *Universal Camera Corp.* v. *Labor Bd.*, 340 U.S. 474 (1951).

[6] The reason for the difference in mark-ups is that the house-to-house canvassers and long-term credit jewelers give credit and guarantees. The larger mark-up permits the vendor to recoup this expense while apparently rendering the service free.

of the pre-ticketed price.[7] There is some evidence that the jobbers and ordinary retail jewlers sell their watches at the pre-ticketed price.

Petitioners first contend that a discount store or catalog sale is not a sale "at retail" since by definition these businesses sell at a "discount." If these sales are excluded, there is no evidence that any Helbros watch sells "at retail" below the pre-ticketed price. Petitioners' argument is ingenious but not persuasive. A retail sale is the transaction by which the merchandise comes into the possession of the ultimate consumer, regardless of the title by which the vendor may choose to denominate himself.[8]

Petitioners also argue that the sales of the house-to-house canvassers and long-term credit jewlers must be included in determining the usual and regular retail price. This too is unsound. These sales are of a different line of watches, selling in a different market, at a different pre-ticketed price. In determining the usual and regular retail price, it is necessary to consider only sales of like items in the same market.[9] But even assuming the correctness of petitioners' argument, it would not impair the validity of the

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[7] The knowledge or intent of the manufacturer is immaterial. *Gimbel Bros.* v. *Federal Trade Commission*, 2 Cir., 116 F. 2d 578 (1941), and cases cited therein. Moreover, the evidence shows that petitioners knew of the practice of the discount stores and catalog houses to sell far below the pre-ticketed price and that, in fact, petitioners supplied them with the price at which the watches should actually sell.

[8] "Retailer: • • • a merchant middleman who sells goods mainly to ultimate consumers." Webster's 3rd International Dictionary (Unabridged 1961), p. 1938. See *Clinton Watch Company* v. *F.T.C.*, supra Note 4; *Walling* v. *Consumers Co.*, 7 Cir., 149 F. 2d 626, 630 (1945).

[9] *Baltimore Luggage Company* v. *F.T.C.*, supra Note 4. See also Murphy, op. cit. supra Note 3, at 427. It should be noted that the Commission order does not prohibit all pre-ticketing, but only that which is fictitious. Helbros may continue to pre-ticket any watch so long as the tag does not misrepresent the usual and regular price.

Commission's determination. This would still leave *at least* 40 per cent of all sales at substantially less than the preticketed price. This is sufficient to constitute fictitious pricing.[10]

There being no error, the portion of the cease and desist order appealed from is affirmed and shall be enforced.

So ordered.

APPENDIX "B"

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
William C. Kern
Philip Elman
Everette MacIntyre

Docket No. 6807

In the Matter of

HELBROS WATCH COMPANY, INC., a corporation,

WILLIAM HELBEIN, JACK DIAMOND, NAT PRIGOZEN, LARRY PRIGOZEN, CARL AVNER, JACK NADEL, individually and as officers of said corporation.

Final Order

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and directing modification of the initial decision:

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[10] *Baltimore Luggage Company* v. *F.T.C.*, supra Note 4, at 611.

IT IS ORDERED that the initial decision be modified by deleting from the preamble of the order to cease and desist contained therein the name William Helbein, and by striking the last paragraph of the initial decision and substituting therefor the following:

> "IT IS FURTHER ORDERED that the complaint be, and the same hereby is, dismissed as to respondent William Helbein."

IT IS FURTHER ORDERED that as modified the initial decision herein be, and it hereby is, adopted as the decision of the Commission.

IT IS FURTHER ORDERED that the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the initial decision.

By the Commission, Chairman Dixon and Commissioner MacIntyre not participating in the issuance of the order at this time.

(SEAL) JOSEPH W. SHEA
Joseph W. Shea,
Secretary.

Issued: December 26, 1961

APPENDIX "C"

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
William C. Kern
Philip Elman
Everette MacIntyre

Docket No. 6807

In the Matter of

HELBROS WATCH COMPANY, INC., a corporation, *et al.*

Opinion of the Commission

By Anderson, Commissioner:

The complaint in this matter charges respondents with violation of the Federal Trade Commission Act. The hearing examiner in his initial decision held that the allegations of the complaint were sustained by the evidence and ordered respondents (except for an individual respondent against whom the complaint was dismissed) to cease and desist from the practices found to be unlawful. Respondents have appealed from this decision.

In substance, the complaint charges respondents with misrepresenting the usual and regular retail prices of watches sold by them to retailers and other distributors and further alleges that respondents falsely represented that their watches contained ruby jewels, were shock proof, shock protected, water resistant and guaranteed for life.

Respondents argue on appeal that none of these allegations were sustained by the evidence and request that the complaint be dismissed. They further contend that certain of the practices have been abandoned and that the hearing examiner erred in failing to so find.

We will consider first the argument that the record does not support the holding in the initial decision that the amounts set forth on tickets affixed to respondents' watches and appearing in price lists supplied by respondents to their customers are in excess of the prices at which such watches are usually and regularly sold at retail. This holding is based in part upon a showing by counsel supporting the complaint that certain dealers or distributors in three market areas regularly sell respondents' watches at prices substantially below the amounts appearing on respondents' price tickets and price lists. Respondents point out that all but one of these dealers or distributors were catalog or discount houses. They then argue that sales by a discount house are made at a discount from retail prices; that such sales are therefore not retail sales and consequently do not tend to prove that the preticketed prices are not the usual and regular prices of respondents' watches. This argument is wholly without merit and must be rejected. The fact that a dealer sells at a lower markup than that used by his supplier in arriving at preticketed prices does not mean that the dealer is not selling at retail nor does it mean that the dealer is selling at a discount from an established price. The aforementioned catalog and discount houses were selling respondents' watches to the ultimate consumer and were, therefore, selling at retail. The evidence establishing that these concerns regularly sold respondents' watches at prices substantially less than the preticketed prices of such watches fully supports the hearing examiner's conclusion that the preticketed prices were not the usual and regular prices of respondents' watches in the trade areas under consideration.

Respondents further contend that the evidence adduced in their defense shows that certain distributors, accounting for approximately 30% of respondents' total sales, sell at the preticketed prices and that the inference should be drawn from this showing that most of respondents' watches are resold at such prices. The record discloses in

this connection that certain firms engaged in the sale of merchandise on a long term credit basis, including house-to-house canvassers and credit jewelers, do, for the most part, sell at the preticketed prices. It appears, however, that the sale of merchandise by these distributors is an entirely different type of operation from that conducted by retailers selling for cash or on a short term credit basis. According to the testimony of respondents' witnesses, the operating costs of the house-to-house canvasser and credit jeweler are so much greater than that of the conventional retailer that it is necessary for such a distributor to sell at a higher markup in order to make a profit. It is respondents' practice, therefore, to apply a higher markup (400% to 500%) in computing the preticketed prices of watches sold through the house-to-house canvasser and credit jeweler than that (250% to 300%) used in arriving at the preticketed prices of watches sold through other distributors. The record also discloses that respondents sell a diffrent line of watches through the house-to-house canvasser and credit jeweler than that sold through other dealers. Consequently, we are of the opinion that the evidence presented by respondents that house-to-house canvassers and credit jewelers adhere to preticketed prices does not indicate that a different class of retailers selling a different line of watches adhere to preticketed prices computed on the basis of a different markup.

Respondents also contend that the hearing examiner erred in finding that certain of their watches were not "water resistant". This finding is based upon the testimony of a witness who had tested several of respondents' watches and found that they did not meet the standards for water resistance specified in trade practice rules promulgated by the Commission.[1] Respondents do not ques-

[1] Trade Practice Rules Respecting the Terms "Water-Proof," "Shockproof," "Nonmagnetic," and Related Designations, as Applied to Watches, Watchcases, and Watch Movements, promulgated April 24, 1947.

tion the reasonableness of the testing standards specified in the rules and, in fact, concede that they have been generally adopted by the industry. They have challenged the qualifications of the witness who conducted the tests, however, and also suggest that the watches had been damaged in some manner prior to testing. The hearing examiner carefully considered both of these points in his decision, and we find nothing in the evidence or in respondents' brief to indicate that the tests had not been properly conducted by a competent person or that the watches tested had been impaired in some manner prior to testing.

The principal objection to this finding is that the hearing examiner failed to give proper weight to the testimony of an expert who had conducted tests of other watches made by respondent and found them to be water resistant. Respondents claim that this testimony completely rebuts the evidence adduced by counsel supporting the complaint. The hearing examiner deemed it unnecessary, however, to determine whether respondents' expert had properly tested respondents' watches for water resistancy, holding that the showing that several watches selected at random were not water resistant was sufficient to sustain the charge even though another group of watches might be found to be water resistant. We find no error in this ruling and agree with the hearing examiner that since respondents have undertaken to make an affirmative representation concerning their watches, they must bear the responsibility of this representation is not true with respect to a portion of the watches.

Other arguments presented in the appeal challenge the sufficiency of the evidence presented in support of the allegations concerning respondents' use of the terms "ruby jewels"; "shockproof" and "shock protected" and the representation that respondents' watches are fully guaranteed. We are convinced from our examination of the record that these allegations have also been sustained and

that the hearing examiner's findings with respect thereto are correct. The arguments on these points are therefore rejected. Respondents' further argument that the practices covered by the aforementioned allegations have been abandoned is without substance and is also rejected. The fact that on another occasion respondents had failed to discontinue certain practices, after having assured the Commission that they would do so, is sufficient reason in itself for rejecting the present plea of abandonment.

Subsequent to the filing of the initial decision in this proceeding, the Commission upon receiving notification of the death of respondent William Helbein, by order of June 8, 1961, dismissed the complaint as to that individual. The order to cease and desist contained in the initial decision will, therefore, be modified in conformity with such order.

Respondents' appeal is denied and the initial decision, modified to conform with this opinion, will be adopted as the decision of the Commission.

December 26, 1961

APPENDIX "D"

Filed Jan. 10, 1963

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1962

No. 16,912

HELBROS WATCH COMPANY, INC., *et al.*, *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

Before WILBUR K. MILLER, FAHY and WRIGHT, *Circuit Judges*.

Final Decree Affirming and Enforcing Order to Cease and Desist

Helbros Watch Co., Inc., Jack Diamond, Nat Prigozen, Larry Prigozen and Carl Avner, having filed in this Court on March 8, 1962, a petition to review and set aside or modify an order to cease and desist issued by the Federal Trade Commission on December 26, 1961, in a proceeding before it entitled "In The Matter of Helbros Watch Co., Inc., a corporation, William Helbein, Jack Diamond, Nat Prigozen, Larry Prigozen, Carl Avner, Jack Nadel, individually and as officers of said corporation"; and the matter having been submitted to the Court on briefs and oral argument, and the Court having fully considered the cause and having on November 29, 1962 rendered its opinion and entered its judgment affirming the portion of the order before the Court for review, and directing the enforcement of the order of the Federal Trade Commission; and it being the opinion of the Court that the entire order was before it;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid petition to set aside or modify the order of the Federal Trade Commission is hereby denied;

It Is Hereby Further Ordered, Adjudged and Decreed that the order to cease and desist be and it hereby is affirmed, and petitioners Helbros Watch Co., Inc., Jack Diamond, Nat Prigozen, Larry Prigozen and Carl Avner, are hereby commanded forthwith to obey and comply with the terms of said order.

By the Court:

/s/ Wilbur K. Miller
/s/ Charles Fahy
/s/ J. Skelly Wright
Circuit Judges.

APPENDIX "E"

Filed Nov. 29, 1962

United States Court of Appeals
for the District of Columbia Circuit

September Term, 1962

No. 16,912

Helbros Watch Company, Inc., *et al.*, *Petitioners*,

v.

Federal Trade Commission, *Respondent*.

On Petition to Review and Modify Order of the Federal Trade Commission.

Before: Wilbur K. Miller, Fahy and Wright, *Circuit Judges.*

Judgment

This case came on to be heard on the record from the Federal Trade Commission, and was argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the portion of the cease and desist order

of the Federal Trade Commission on review in this case is affirmed, and the order shall be enforced.

Pursuant to Rule 38(1) the Federal Trade Commission shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion and judgment of this court.

PER CIRCUIT JUDGE WRIGHT.

Dated: November 29, 1962.

APPENDIX "F"

15 USCA 45

Section 45 Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices

(a) Unfair methods of competition in commerce, and unfair or deceptive practices in commerce, are declared unlawful.

The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Act to regulate commerce, air carriers and foreign air carriers subject to chapter 9 of Title 49, and persons, partnerships, or corporations subject to sections 181-203, 205-228 and 229 of Title 7, except as provided in section 227 of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear

to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41-46 and 47-58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership or corporation an order requiring such person, partnership or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or if a petition for review has been filed within such time then until the transcript of the record in the proceeding has been filed in a circuit court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such a manner as it shall deem proper, modify or set aside in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may

at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.